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08-269

IN THE

Supreme Court of the United States

CSX TRANSPORTATION, INC.,

Petitioner,

v.

RICHARD RIVENBURGH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The Respondent does not dispute the Statement of the Case provided by the Petitioner.

STATEMENT OF REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI FILED BY THE CSX TRANSPORTATION, INC.

Rule 15.2 of the Rules of this Court directs counsel for the Respondent to call to the attention of this Court in the Brief in Opposition any objection to consideration of a question presented based on what occurred in the proceedings below. Adams v. Robertson, 117 S. Ct. 1028, 1032 (1997). Accordingly, the Respondent hereby brings to the attention of this Court that the issues sought to be presented in the present Petition for a Writ of Certiorari were not advanced or preserved in either the United States District Court for the Northern District of New York or the United States Court of Appeals for the Second Circuit.

The Petitioner presents two questions to this Court: whether there should be a relaxed standard of causation under the Federal Employers' Liability Act, 45 U.S. Code § 51-60, and, second, whether there should be a relaxed standard of negligence under that Act. However, in the lower courts, the standard of causation and the standard of negligence were not challenged in this fashion by the Petitioner. Therefore, the Court should decline to entertain these claims at this time.

Attached to the Petition for a Writ of Certiorari as Exhibit B is a copy of the Memorandum-Decision-Order of the United States

District Court for the Northern District of New York dated September 5, 2006. As this Court will see, District Judge Gary L. Sharpe ruled against the Petitioner with respect to its post trial motion for judgment notwithstanding the verdict and for a new trial. In those pleadings, the Petitioner argued the following issues:

> (1) CSX was entitled to judgment as a matter of law because the findings of the jury were the result of surmise and conjecture and were not supported by competent evidence;
> (2) The Respondent failed to prove causation;
> (3) The Respondent failed to prove that the Petitioner was on notice of a dangerous condition;
> (4) The Respondent failed to prove that the Petitioner had a reasonable opportunity to repair a dangerous condition;
> (5) The weight of the evidence was adversely impacted by erroneous evidentiary rulings at trial;
> (6) The jury's findings regarding comparative negligence were against the weight of the credible evidence; and
> (7) The award was excessive. (15a)

In dismissing the Petitioner's arguments, the District Court noted that it was following the well settled standards for negligence and causation set forth in Williams v. Long Island Railroad Company, 196 F. 3d 402 (2nd Cir. 1999) (16a-17a). The District Court proceeded to discuss the evidence in light of those standards of negligence and causation. At no point did the District Court have to address an issue regarding the validity of those standards since such a claim was not raised before the District Court.

On appeal to the United States Court of Appeals for the Second Circuit, the Petitioner raised the following issues:

> (1) The District Court had erred in denying the Petitioner's pretrial motion for summary judgment;
> (2) The District Court had erred in denying its post-trial motion that the findings of the jury were the result of conjecture as to causation;
> (3) The District Court had erred in denying the Petitioner's post-trial motion that the Respondent had failed to prove that the Petitioner had notice of a dangerous condition;
> (4) The District Court had erred in denying the Petitioner's post trial motion that the weight of the evidence was adversely impacted by the trial court's erroneous evidentiary rulings; and

(5) The District Court had erred in denying the Petitioner's post trial motion that the jury's damage award was excessive (2a-3a).

In deciding that appeal, the Court of Appeals applied the relaxed standard for negligence and causation as set forth in its ruling in Williams v. Long Island Railroad Company, supra. The court found no error in the District Court's assessment that the jury had before it sufficient evidence to support its verdict as it measured the evidence by the Williams standards. There is nothing in the Opinion which discusses the validity or propriety of those standards since those issues were not raised in the Court of Appeals. See Appendix A, the disposition of this case in the United States Court of Appeals for the Second Circuit dated May 30, 2008.

In the present petition, the Petitioner seeks a grant of certiorari so that this court can resolve a question allegedly left open in Norfolk Southern Railway Company vs. Sorrell, 127 S. Ct. 799 (2007), to wit, whether in an action under this Act, the Plaintiff must prove that the defendant's negligence was the proximate cause of the injury or need satisfy only "a relaxed standard" of causation and of negligence. While it is true that the decision in Norfolk was not released until January 10, 2007, which was subsequent to the Petitioner's brief in the Second Circuit of Appeals (filed December 1, 2006), the Respondent notes that no further submissions

were offered to the United States Court of Appeals for the Second Circuit after the Norfolk decision on January 10, 2007 and before the ruling in this case by the Court of Appeals on May 30, 2008. Under Rule 28(j) of the Rules of Appellate Procedure, when pertinent and significant authorities come to a party's attention after the party's brief has been filed, the party may advise the circuit clerk by letter setting forth such a citation and offering reasons for the reference. According to the Commentary to the Rule, the Rule does not forbid "argument" with respect to this reference. Nevertheless, no such letter was submitted by the Petitioner to the Court of Appeals after this Court decided Norfolk, supra.

Furthermore, a review of the Norfolk case reveals that it was based upon an assessment of this Court's earlier decision in Rogers v. Missouri Pacific Railway Company, 352 U.S. 500 (1957). An inspection of the Brief filed on behalf of the Petitioner in the Court of Appeals shows that the Rogers case is not even mentioned (see Petitioner's Brief for Appellant in the Court of Appeals for the Second Circuit, pages iii-iv).[1]

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[1] The Table of Authorities in the Petitioner's Brief before the United States Court of Appeals for the Second Circuit is limited to cases involving the four issues set forth in the Issues Presented section of the Brief. They were as follows: 1. Did the trial court commit error or abuse its discretion when it refused to grant Defendant's motion for summary judgment? 2. Did the trial court commit error or abuse its discretion when it refused to grant Defendant's motion pursuant to FRCP 50 and 59? 3.

Of course, the reason for this omission is that the Rogers case, and the related issue of the propriety of the standards of negligence and causation, was not presented in the Petitioner's appeal before the Second Circuit Court of Appeals.[2]

It is well settled by the jurisprudence of this

Did the trial court commit error or abuse its discretion when it permitted the Plaintiff and his coworker Mr. Zinzow to offer expert opinion testimony over the objection of defense counsel? and 4. Did the trial court abuse its discretion by admitting into evidence a torch tip that was not similar to the torch tip which was used by the plaintiff at the time he was injure? No issue was presented regarding a challenge to Rogers, supra, or Williams, supra, in the Brief for the Petitioner in the Court of Appeals.

[2] In the Petition for a Writ of Certiorari at page 22, the Petitioner cites two other cases decided by this Court concerning the issue of causation discussed in Rogers, to wit, Crane v. Cedar Rapids and Iowa City Railway Company, 395 U.S. 314 (1969) and Consolidated Rail Corp. v. Gottshall, 512 U.S. 532 (1994). Like the situation with regard to Rogers, supra, neither Crane nor Gottshall was cited or referenced in the Petitioner's submissions before either the United States District Court or the United States Court of Appeals. The same is true with regard to the citation in the Petition for a Writ of Certiorari at page 24 of the case of Gautreaux v. Scurlock Marine, Inc.107 F. 3d 331 (5th Cir. En Banc 1997), as a basis for the Petitioner's challenge on the standard of care issue. As this Court will note, the decision in Gautreaux was never presented in any of the briefs filed on behalf of the Petitioner in the lower courts.

court that an issue will not be addressed for the first time by the United States Supreme Court where it has not been properly advanced and preserved before the lower courts. Hall Streets Associates, LLC v. Mattel, Inc., 128 S. Ct. 1396, 1407 (2008); Travelers Insurance Company v. Pacific Gas and Electric Company, 127 S. Ct. 1199, 1207 (1007); MedImmune, Inc. v. Genentech, Inc., 127 S. Ct. 764, 776 (2007). In accord is Regal v. Medtronic, Inc., 128 S. Ct. 999, 1011 (2008) (when a contention is raised in the Supreme Court in the first instance, this Court will not address the argument where it was not presented in the party's Brief in the United States Court of Appeals for the Second Circuit).

In the instant case, the question whether the standard of causation under FELA is proximate causation or some less stringent standard is not ripe for definitive resolution by this Court in the present case. The same waiver analysis applies to the question whether there is a relaxed standard of negligence under the Act. Therefore, this Court should exercise its discretion to decline to grant certiorari as to either of these issues.

CONCLUSION

The Respondent Richard Rivenburgh respectfully submits that the Petition for a Writ of Certiorari filed with this Court on behalf of CSX Transportation, Inc. should be denied.

Respectfully submitted,

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